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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SHEARSON/AMERICAN EXPRESS INC. and
MARY ANN MCNULTY,

Petitioners,

v.

EUGENE MCMAHON, JULIA MCMAHON, individually and as trustees of THE DAVID J. HODDER & SON, INC. EMPLOYEE PENSION PLAN; THE DAVID J. HODDER & SON, INC. PROFIT SHARING PLAN; THE LAURIE FUNERAL HOME, INC. EMPLOYEE PENSION PLAN; and THE LAURIE FUNERAL HOME PROFIT SHARING PLAN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN ARBITRATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Interest of *Amicus Curiae*

The American Arbitration Association ("AAA") files this brief as *amicus curiae* in support of petitioners by written consent of all parties, pursuant to Rule 36.2 of the Rules of this Court.

The AAA is an educational, membership organization incorporated in 1926 and operating under the Not-for-Profit Corporation Law of the State of New York. The AAA is dedicated to the dissemination of knowledge throughout the United States and other countries regarding arbitration and other methods of alternative dispute resolution. The AAA does not act as an arbitrator of disputes; rather, it provides impartial rules, procedures, panels of experienced arbitrators and administrative assistance to parties desiring to use its neutral facilities. The AAA's role as an impartial administrator of arbitration has been recognized in numerous state and federal statutes and regulations. *See infra* at 18 n.26. In 1985, approximately 45,000 arbitrations were conducted under the auspices of the AAA.

The AAA also conducts extensive educational programs on arbitration and other aspects of alternative dispute resolution, and administers a variety of arbitration systems in different industries, including the construction, textile, insurance, real estate, computer and grain industries.

This is the first case in which this Court has been asked to determine the arbitrability of a claim under the Securities Exchange Act of 1934 (the "Exchange Act") in a domestic commercial dispute. The AAA believes that it can present to this Court a different perspective from the one presented by the parties. By virtue of its sixty years of experience in private dispute resolution, the AAA is uniquely qualified to address issues before the Court as they relate to arbitration agreements. The AAA has only one concern here: to have this Court reaffirm its fundamental support for arbitration and for the rights of parties in commercial relationships to elect arbitration as the certain means by which future disputes may be resolved.

The AAA has appeared previously in this Court as *amicus curiae* in cases involving the arbitrability of various disputes, including *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); and *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

Summary of Argument

The Federal Arbitration Act, which established a strong national policy in favor of arbitration, requires enforcement of agreements to arbitrate commercial disputes. As this Court has held, this includes enforcing arbitration clauses covering statutory claims—such as those asserted under the Exchange Act and RICO here—unless Congress has expressly precluded arbitration of such claims. (Point A)

Because there is nothing in the Securities Act of 1933 (the "Securities Act")—or in its legislative history—evidencing Congress's intent to preclude arbitration, arbitration agreements should be enforced as to commercial disputes under that statute. *Wilko v. Swan*, 346 U.S. 427 (1953), which held that arbitration clauses were unenforceable as to disputes under the Securities Act, should be overruled since it was not based on evidence of Congressional intent to preclude arbitration. Rather, *Wilko* was based on a suspicion of arbitration which is in conflict with the underlying purpose of the Arbitration Act and is contrary to the recent decisions of this Court. Moreover, *Wilko*'s fundamental assumptions have been disproven by the extensive experience with arbitration in the more than thirty years since it was decided. That experience demonstrates that arbitration is a fair and effective method for resolving commercial disputes in general and securities disputes in particular. That it is not biased against customers is shown by the fact that customers have won over two-thirds of the recent cases against securities firms arbitrated to decision under the auspices of the AAA. The positive experience with commercial arbitration—which has resulted in its virtually uniform acceptance by courts in the United States and elsewhere—negates the suspicion of arbitration underlying *Wilko*. Consequently, arbitration clauses should be enforced as to Securities Act claims; *a fortiori* they should be enforced as to implied causes of action under the Exchange Act. (Point B)

Similarly, there is no evidence of Congressional intent to preclude arbitration of RICO claims. Courts which have held

such claims to be non-arbitrable have relied on a broad so-called "public policy" exception to arbitration that is directly contrary to the Arbitration Act and the decisions of this Court. (Point C)

ARGUMENT

A. THE FEDERAL ARBITRATION ACT REQUIRES ENFORCEMENT OF ARBITRATION CLAUSES FOR COMMERCIAL DISPUTES BETWEEN CONTRACTING PARTIES—INCLUDING DISPUTES BASED UPON STATUTORY CLAIMS—UNLESS CONGRESS SPECIFICALLY INTENDED TO PRECLUDE ARBITRATION

The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, makes a written agreement to arbitrate "in any . . . contract evidencing a transaction involving commerce . . . valid, irrevocable and enforceable. . . ." 9 U.S.C. § 2. The "preeminent concern" of Congress in passing the Arbitration Act was "to enforce private agreements [to arbitrate] into which parties had entered." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985). As this Court has noted, the Arbitration Act "was designed to overcome an anachronistic judicial hostility to agreements to arbitrate," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346, 3354 n.14 (1985), and to replace it with a "national policy favoring arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).[1] As a result

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1 The House Report accompanying the Arbitration Act stated that

> The purpose of this bill is to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction of admiralty, or which may be the subject of litigation in the Federal Courts.

H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924). The House Report explained that the need for the law

> arises from . . . the jealousy of the English Courts for their own jurisdiction. . . . This jealousy survived for so lon[g] a period that

(*Footnote continued on next page*)

of the "liberal federal policy favoring arbitration agreements," *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983), "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," *id.* at 25, and agreements to arbitrate commercial disputes must be "rigorously enforce[d]." *Dean Witter*, *supra*, 470 U.S. at 221.

The "national policy favoring arbitration" which Congress declared in the Arbitration Act applies with equal force where "a party bound by an arbitration agreement raises claims founded on statutory rights." *Mitsubishi*, *supra*, 105 S. Ct. at 3354. Thus, an arbitration clause covering statutory claims must be enforced in the absence of "Congressional intention expressed in some other statute . . . [that] agreements to arbitrate [should] be held unenforceable." *Id.* at 3355.

> We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. . . . Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.

Id. at 3355.

(*Footnote continued from previous page*)

> the principle became firmly embedded in the English common law and was adopted with it by the American courts. . . .

Id. at 1-2. *See also Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974) (Arbitration Act, "reversing centuries of judicial hostility to arbitration agreements, was designed . . . to place arbitration agreements 'upon the same footing as other contracts' ") (citation and footnote omitted); *Dean Witter*, *supra*, 470 U.S. at 219 ("The legislative history of the [Arbitration] Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate."); *Southland Corp.*, *supra*, 465 U.S. at 12-13; *Mitsubishi*, *supra*, 105 S. Ct. at 3353-54.

The Arbitration Act represents a clear statement of Congressional support for party autonomy in contractual matters. "[P]assage of the [Arbitration] Act was motivated, first and foremost, by a congressional desire to enforce [arbitration] agreements into which parties had entered." *Dean Witter*, *supra*, 470 U.S. at 220 (footnote omitted).[2] Simply stated, Congress has "mandated the enforcement," *Southland Corp.*, *supra*, 465 U.S. at 10, of agreements[3] to arbitrate commercial[4] disputes between contracting parties—including disputes raising statutory claims—unless Congress expressly intended to preclude arbitration of such disputes.

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2 As the House Report stated:

> Arbitration agreements are purely matters of contract and the effect of the bill was simply to make the contracting party live up to his agreement. He can no longer refuse to perform a contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs.

Id. at 1. *See also* S. Rep. No. 536, 68th Cong., 1st Sess. 1, 3 (1924) (citing "practical justice in the enforced arbitration of disputes where written agreements for that purpose have been voluntarily and solemnly entered into").

3 Where an agreement to arbitrate is not voluntary, the Arbitration Act does not contemplate its enforcement. 9 U.S.C. § 2; *see Mitsubishi*, *supra*, 105 S. Ct. at 3354. In this regard, a contract to arbitrate is like any contract, *i.e.*, it will not be enforced if entered into non-voluntarily, for example, under duress or by mistake. Here, the district court expressly rejected respondents' claim that the arbitration clause was not voluntarily agreed to, a finding which was not disturbed by the Second Circuit. *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94, 96, 99 n.6 (2d Cir. 1986). As was the case in *Mitsubishi*, "there is no basis for assuming" that the arbitration clause was not voluntarily agreed to. 105 S. Ct. at 3357. If it was not, respondents had the opportunity to make such a showing and avoid the clause. *Id.*

4 The Arbitration Act applies to "transaction[s] involving commerce." 9 U.S.C. § 2.

B. *WILKO V. SWAN* SHOULD BE RE-EXAMINED SINCE IT WAS BASED ON A NOW CLEARLY OUTDATED AND IMPROPER SUSPICION OF ARBITRATION RATHER THAN ON EVIDENCE OF CONGRESSIONAL INTENT TO PRECLUDE ENFORCEMENT OF ARBITRATION CLAUSES FOR SECURITIES ACT DISPUTES[5]

1. There Is No Evidence That Congress Intended To Preclude Arbitration Of Securities Act Disputes

a. The Non-Waiver Provision Of The Securities Act Does Not Evidence A Congressional Intent To Preclude Arbitration

In *Wilko v. Swan*, 346 U.S. 427 (1953), a divided Court, acknowledging that it was faced with a difficult issue, held that an arbitration clause in an agreement between a securities broker and his customer was not enforceable as to a claim

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5 We recognize that the question of the arbitrability of Securities Act disputes is not directly before the Court in this case. However, there are at least three reasons why the Court should nevertheless overrule *Wilko* now. First, a holding that Exchange Act claims are arbitrable which does not address the continuing validity of *Wilko* could well result in continuing confusion among the lower courts as to the arbitrability of Securities Act claims and other statutory claims. Second, since under *Dean Witter* arbitrable claims must be arbitrated even if intertwined with non-arbitrable claims, a decision that Exchange Act claims are arbitrable which does not address the continuing validity of *Wilko* will likely lead to fragmented and duplicative proceedings until this Court addresses *Wilko*. Third, given the significant burden of securities litigation on the federal courts (over 3,000 securities and commodities exchange civil actions were filed in federal district courts in the twelve month period ending March 31, 1986; *see* Statistical Analysis and Reports Division, Administrative Office of the U.S. Courts, *Federal Judicial Workload Statistics*, Table C-2 at 13 (1986)), a burden which will only increase with the dramatic increase in public participation in the securities markets, *see* New York Stock Exchange, *Shareownership 1985* at 3 (number of shareholders has increased from approximately 7 million in 1953 when *Wilko* was decided to over 47 million in 1985), failure to overrule *Wilko* now will permit a continuing flood of securities cases that could better be dealt with through voluntary agreements to arbitrate.

under Section 12 of the Securities Act. In reaching this conclusion, the *Wilko* majority relied upon the non-waiver clause of the Securities Act, which provides:

> Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the [Securities Exchange] Commission shall be void.

15 U.S.C. § 77n. This clause prevents those regulated by the statute (including issuers, underwriters, dealers and brokers) from attempting to relieve themselves from compliance with any of the substantive standards of conduct imposed by the statute, such as the filing and disclosure requirements imposed on an issuer of securities. However, neither any "provision" of the Securities Act, nor any rule or regulation of the Securities Exchange Commission (the "SEC"),[6] requires that disputes arising under the Act be litigated only in a judicial forum. Moreover, such substantive standards of conduct do not, by implication, incorporate the judicial system as the sole method of dispute resolution. Consequently, a clause providing for arbitration of disputes cannot properly be construed as a stipulation waiving compliance with any of the provisions of the Securities Act. As this Court held in *Mitsubishi*:

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6 Although the SEC promulgated a regulation purporting to prohibit agreements binding customers to arbitrate future claims arising under the securities laws, 17 C.F.R. § 240.15c2-2, "in adopting [that] Regulation . . . the SEC intended only to reflect what it believed to be a settled principle of law (*i.e.* that predispute arbitration agreements are unenforceable under both the [Securities] Act and the [Exchange] Act). As this opinion indicates, the SEC was mistaken." *Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d 1393, 1398 n.17 (8th Cir. 1986).

Regulation 15c2-2 appears to have been ignored by the SEC as well as by most courts, as *amicus* is aware of no instance of the SEC's attempting to enforce it. In any event, since Regulation 15c2-2 conflicts with the Arbitration Act, it was beyond the SEC's jurisdiction to promulgate it. 5 U.S.C. § 706(2)(A), (C).

> By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.

105 S. Ct. at 3355; *see also Wilko*, *supra*, 346 U.S. at 439-40 (Frankfurter, J., dissenting). Congress had passed the Arbitration Act in 1925, only eight years before the Securities Act. It could easily have added a provision to the Securities Act expressly exempting it from the Arbitration Act. That it did not do so is evidence that it did not intend the Securities Act to create an exception to the statutory rule created by the Arbitration Act.

Indeed, what the *Wilko* majority did was find a partial repeal of the Arbitration Act by implication, based upon the non-waiver provision of the Securities Act. However, "[t]he cardinal rule is that repeals by implication are not favored." *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). Rather, it is presumed that when Congress wants to repeal or limit an earlier statute, it will do so explicitly. *See, e.g., St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 787-88 (1981); *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939); *Posadas*, *supra*.[7] As this Court has explained, whenever possible, two statutes should be interpreted so as to give effect to both:

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7 In this regard the *Wilko* majority's reliance on *Boyd v. Grand Trunk Western R. Co.*, 338 U.S. 263 (1949), was misplaced. *Boyd* held that a choice of venue provision was void as violative of a non-waiver provision in the Federal Employers' Liability Act ("FELA"). *Id.* at 264-65. However, in *Boyd* there was no competing statute involved; rather, the Court was simply interpreting a provision of FELA. Here, in contrast, the non-waiver provision of the Securities Act cannot be construed in isolation because there is a competing statement of Congressional intent embodied in the Arbitration Act, namely that arbitration clauses "in any . . . contract evidencing a transaction involving commerce" are to be enforced. 9 U.S.C. § 2.

> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal 'must be clear and manifest.' "

Morton v. Mancari, 417 U.S. 535, 551 (1974) (quoting *United States v. Borden Co.*, *supra*, 308 U.S. at 198); *see also Watt v. Alaska*, *supra*; *Posadas*, *supra*. "In the absence of some affirmative showing of an intention by Congress to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton*, *supra*, 417 U.S. at 550. The Securities Act does not expressly preclude enforcement of arbitration clauses. It does not reflect a "clear and manifest" intention to repeal the Arbitration Act, and is not "irreconcilable" with it. *Morton*, *supra*, 417 U.S. at 550-51. Consequently, this "long-established canon of [statutory] construction," *St. Martin Evangelical Lutheran Church*, *supra*, 451 U.S. at 788, requires giving effect to the Arbitration Act's terms and holding arbitration clauses enforceable as to Securities Act claims.[8]

b. Nothing In The Legislative History Of The Securities Act Evidences A Congressional Intent To Preclude Arbitration

There is nothing in the legislative history of the Securities Act that evidences Congress's intent to preclude arbitration. It is significant that neither the *Wilko* majority, nor the SEC in

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8 The *Wilko* majority stated that it was faced with two conflicting statements of Congressional policy in the Arbitration Act and the Securities Act, 346 U.S. at 438, but, contrary to the teaching of cases such as *Morton* and *Posadas*, it made no effort to reconcile them. Instead, the majority impermissibly "picked and chose" the enactment it preferred, even though the two statutes are perfectly "capable of co-existence." *Morton*, *supra*, 417 U.S. at 551.

its *amicus* brief in *Wilko*, pointed to *anything* in the legislative history of the Securities Act indicating that Congress intended to exempt it from the express provisions of the Arbitration Act which it had recently passed.[9] Rather, as discussed below, the *Wilko* majority *assumed* a Congressional intent to preclude arbitration based on its suspicion of arbitration as a means of resolving securities disputes. As demonstrated above, the Arbitration Act was intended to overcome just such judicial hostility to arbitration.

2. *Wilko* Was Based On An Assumption That Congress Intended To Preclude Arbitration Because Of A Suspicion Of Arbitration That Was Specifically Rejected By Congress In The Arbitration Act

In holding that the non-waiver provision of the Securities Act precluded arbitration, the *Wilko* majority did not rely on express language to that effect in the Securities Act or its legislative history. Rather, it relied on its suspicion of arbitration as a means for resolving Securities Act disputes. Thus, the *Wilko* majority adopted the argument of the petitioner there that "arbitration lacks the certainty of a suit at law." 346 U.S. at 432, 435. The *Wilko* majority further asserted that the effectiveness of "the provisions of the Securities Act, advantageous to the buyer . . . is lessened in arbitration as compared to judicial proceedings," *id.* at 435, and that arbitrators are not as capable as courts in making "subjective findings on . . . purpose and knowledge." *Id.* at 435-36. Finally, and most significantly, the Court assumed that because, in its view, "the protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness,

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9 The statement contained in a 1975 House Conference Committee report apparently recognizing the *Wilko* doctrine, *see* H.R. Rep. No. 229, 94th Cong., 1st Sess. 111, *reprinted in* 1975 U.S. Code Cong. & Admin. News 321, 342 (1975), is not persuasive evidence of the intent of Congress in 1933 when the Securities Act was passed. *See, e.g., Haynes v. United States*, 390 U.S. 85, 87 n.4 (1968); *United States v. Price*, 361 U.S. 304, 313 (1960).

it seems to us that Congress must have intended [the non-waiver provision] to apply to waiver of judicial trial and review." *Id.* at 437.

Conspicuously absent from the Court's discussion was any evidence supporting its assumptions or demonstrating that they were shared by Congress.[10] To the contrary, the majority's assumptions reflect precisely the kind of judicial hostility to arbitration that was expressly rejected by Congress in passing the Arbitration Act.

3. This Court's Recent Decisions—And The Extensive Experience With Arbitration Since *Wilko*—Show That Arbitration Is A Fair And Effective Method For Resolving Securities Disputes. Consequently, *Wilko* Should Be Overruled

In the thirty years since *Wilko* was decided, this Court has overcome the judicial hostility to arbitration reflected in *Wilko* and, in a series of recent decisions, has reflected the intent of Congress as expressed in the Arbitration Act.[11] As this Court stated in *Mitsubishi*,

> we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.

105 S. Ct. at 3354.

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10 As Justice Frankfurter stated in dissent:

> There is nothing in the record before us, nor in the facts of which we can take judicial notice, to indicate that the arbitral system as practiced in the City of New York, and as enforceable under the supervisory authority of the District Court . . . , would not afford the plaintiff the right to which he is entitled.

346 U.S. at 439.

11 *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, *supra*; *Dean Witter Reynolds Inc. v. Byrd*, *supra*; *Southland Corp. v. Keating*, *supra*; *Moses H. Cone Memorial Hospital v. Mercury*, *supra*; *Scherk v. Alberto-Culver Co.*, *supra*; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, *supra*.

Coinciding with this trend in the decisions of this Court, arbitration has become increasingly sophisticated—and increasingly common—over the last 30 years. This is due to the widespread recognition of the advantages of arbitration in terms of speed, economy, efficiency and confidentiality and the increasing recognition of its fairness as a means of dispute resolution.[12]

The rules and procedures which govern arbitration are designed to ensure fair results.[13] Thus, the AAA's Commercial Arbitration Rules, which are reproduced at Appendix B, provide for neutral arbitrators (Article 12), and provide both for disqualificaton of an arbitrator due to "any circumstances likely to affect impartiality" (Article 19), and for peremptory challenges for any reason (Article 13). Any party may be represented by counsel (Article 22). Pre-hearing conferences and preliminary hearings may be held to arrange for the exchange of information and the production of relevant documents, and to attempt to narrow the issues and expedite the proceedings (Article 10). The Arbitrator can subpoena witnesses and documents for the hearing (Article 31; *see also* 9 U.S.C. § 7), and any party has a right to offer any relevant

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12 As the Court noted in *Mitsubishi*, "it is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forego access to judicial remedies." 105 S. Ct. at 3358.

13 Significantly, the SEC has approved the operation and implementation of the arbitral systems for securities cases provided by the National Association of Securities Dealers (the "NASD"), the New York Stock Exchange (the "NYSE") and the American Stock Exchange, *see* SEC Securities Exchange Act Release No. 16390 (Nov. 30, 1979), 18 SEC Docket 1197, and retains general jurisdiction to monitor the fairness of the rules of the NASD and the Exchanges, including the rules governing their arbitration proceedings. *See* 15 U.S.C. § 78s(c). The procedures adopted by the NASD and the Exchanges are generally similar to those of the AAA. This Court has favorably referred to aspects of the AAA's arbitration rules. *See Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149 (1968).

evidence (Article 31), and to require that witnesses testify under oath (Article 27). Any party has a right to have a stenographic record of the proceeding (Article 23),[14] and briefs may be filed (Article 35). A written award is required (Article 42), and, as a matter of practice, the award can contain an explanation of reasons if the parties so request.[15] Arbitration is also designed to be convenient. Thus, the AAA has offices in over 30 cities, *see* AAA, *1985 Annual Report* (1986), and the arbitration may be held in any location to which the parties agree (Article 11).[16]

Moreover, arbitrators are available today who are experienced and fully competent to apply the securities laws.[17] For example, of the 89 arbitrators in 40 recent AAA cases brought by customers against securities firms which were arbitrated to decision, 71 (80%) were lawyers (including 41 attorneys who specialized in securities work and three retired judges), and 16 (18%) were business or accounting executives or financial consultants (the remaining two were college deans or professors).[18] As the *Mitsubishi* Court noted, "adaptability and access to expertise are hallmarks of arbitration. The antici-

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14 Thus, the *Wilko* Court's concern that an award may be made "without a complete record of the[ ] proceedings," 346 U.S. at 436, is unfounded as either party may request such a record.

15 Thus, the *Wilko* Court's concern that an award may be made "without [an] explanation of the[ ] reasons," 346 U.S. at 436, is exaggerated, as the parties may request such an explanation.

16 Similarly, the NYSE has standing panels in 35 cities and NASD in 50 cities, and each will conduct hearings elsewhere upon agreement of the parties. (Communications with the New York City offices of the NYSE and NASD.)

17 Unlike the situation in 1953 when *Wilko* was decided, there is now a fully developed body of case law interpreting the securities laws to which arbitrators can turn for guidance. *See generally* E. Gadsby, *Business Organizations—Securities Regulation* (1986); A. Bromberg & L. Lowenfels, *Securities Fraud and Commodities Fraud* (1985).

18 These were the 40 most recent such cases at the time statistics for this brief were collected. (Materials in files of AAA's Office of Case Administration.)

pated subject matter of the dispute may be taken into account when the arbitrators are appointed and arbitral rules typically provide for the participation of experts." 105 S. Ct. at 3357.

In choosing arbitration, the parties have selected these procedures as the means to resolve their disputes, and the courts should not interfere with that selection. This is especially true because, in addition to satisfying the parties' desire for quick, economical and fair resolution of disputes, arbitration will fully satisfy the federal policies underlying the securities laws. Arbitrators deciding securities claims are obligated to apply the federal securities laws,[19] *Wilko*, *supra*, 346 U.S. at 433-34, and their awards can be vacated for a number of statutory grounds, including "[w]here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(d). Since enforcement of an arbitration award may require confirmation by a court, 9 U.S.C. § 9, the courts will have an "opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the [securities] laws has been addressed." *Mitsubishi*, 105 S. Ct. at 3360.[20] The prospect of judicial review where there is no voluntary compliance with the award helps to assure that the policies embodied in the securities laws will be applied. The *Wilko* Court's suspicion that arbitration would somehow un-

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19 Thus, the situation here is fundamentally different from those cases where this Court has held that because the arbitrators are bound to apply collective bargaining agreements rather than the applicable statutes, arbitration would not be binding for the statutory claims. *See Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 744 (1981) (Fair Labor Standards Act); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56-57 (1974) (Title VII). Here, by contrast, the arbitrators are bound to apply the securities laws, not some separate agreement, *Wilko*, *supra*, and it will be a simple task for the court at the enforcement stage "to ascertain that the [arbitral] tribunal took cognizance of the [securities] claims." *Mitsubishi*, *supra*, 105 S. Ct. at 3360.

20 Copies of any relevant papers in the AAA's possession will be released to any party for use in any proceeding to vacate or enforce the award (Article 46).

dermine those policies is simply unfounded. *See Mitsubishi, supra*, 105 S. Ct. at 3360.[21]

The extensive actual experience with arbitration in the more than thirty years since *Wilko* further compels the conclusion that the time has come to overrule *Wilko*. In 1950, shortly before the *Wilko* decision, the AAA had a total of approximately 1750 arbitrations, fewer than 500 of which were commercial. In 1985, in contrast, the total number of arbitrations had increased more than 25 times to 45,000, over 8,000 of which were commercial.[22] This extensive, nationwide experience with arbitration has shown that it is a fair, efficient and effective means to resolve commercial disputes in general. Thus, in recent years, the virtues and efficacy of arbitration have been widely recognized by courts and commentators. *See, e.g.*, Burger, "Isn't There A Better Way?" 68 Am. Bar Assoc. J. 274 (March 1982); Furnish, "Commercial Arbitration Agreements," *supra*; Meyerowitz, "The Arbitration Alternative," 71 Am. Bar Assoc. J. 78 (Feb. 1985).

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21 It should be noted that insofar the public is concerned, arbitration clauses are likely to be present primarily in individual actions by customers against their brokers, such as the case here. Such clauses are unlikely to be present in a variety of other cases under the securities laws, such as actions by customers (individually or as a class) against issuers or underwriters for allegedly false and misleading disclosures, since there is generally no contractual relationship between customers and issuers or underwriters. *See, e.g., Globus v. Law Research Service, Inc.*, 287 F. Supp. 188 (S.D.N.Y. 1968), *aff'd in part and rev'd in part*, 418 F.2d 1276 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970) (action by purchaser against underwriter under § 12(2) of the Securities Act and § 15(c) of the Exchange Act for material omissions from offering circular); *Weiss v. Tenney Corp.*, 47 F.R.D. 283 (S.D.N.Y. 1969) (action by purchaser against issuer under §§ 11 and 17(a) of the Securities Act and § 10(b) of the Exchange Act for false and misleading statements in the registration statement and prospectus).

22 Materials in files of AAA's Office of Case Administration. *See also* Hirshman, "The Second Arbitration Trilogy: The Federalization of Arbitration Law," 71 Va. L. Rev. 1305, 1305 n.7 (1985); Furnish, "Commercial Arbitration Agreements and the Uniform Commercial Code," 67 Calif. L. Rev. 317, 317-18 & n.1 (1979).

Experience has also shown that arbitration is a fair method of resolving securities disputes in particular. Contrary to the *Wilko* majority's assumptions, arbitration of securities disputes has not proven to be disadvantageous to customers. For example, of 40 cases brought by customers against securities firms recently arbitrated to decision under the auspices of the AAA, 27 (68%) resulted in awards for the customer, in an average amount of over $26,000, including four awards of punitive damages (ranging from $50,000 to $150,000).[23]

That arbitration is a fair and effective method of resolving securities disputes is also confirmed by the experience in other countries. Arbitration clauses are generally enforceable as to securities claims in at least the following countries: Austria, Belgium, Canada, Denmark, France, Germany, Great Britain, Greece, Italy, Japan, Netherlands, Singapore, Spain and Switzerland.[24] *See also Scherk*, *supra*; *Mitsubishi*, *supra*.[25]

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23 Materials in files of AAA's Office of Case Administration. Similarly, NASD statistics show that in 1985, 55% of the public customer cases that were arbitrated to decision awarded damages to the customer. *See* Securities Industry Conference on Arbitration, Report No. 5 at 7 (April 1986).

24 *See* International Council for Commercial Arbitration, *International Handbook on Commercial Arbitration*, Supp. 1 (May 1984) at 5-6 (Austria); 4-5 (Belgium); 5 (Canada); 8-9 (Great Britain); *id.* Supp. 3 (Jan. 1985) at 15-18 (Italy); 8-9 (Switzerland); *id.* Supp. 4 (Nov. 1985) at 7-8 (Greece); *id.* Supp. 5 (May 1986) at 6-7 (Denmark); Doing Business in Europe, Common Market Rep. (CCH) ¶ 27033 (1986) (Netherlands); ¶ 28553 (Spain); International Council for Commercial Arbitration, *Year Book: Commercial Arbitration* Vol. XI (1986) at 29-33 (Singapore); P. Gide, J. Loyrette and P. Nouel, *Le Droit Francais de L'Arbitrage* at 57-75 (1983) (France); O. Glossner, *Commercial Arbitration in the Federal Republic of Germany* (1984) at 2-4, 55 (Germany); Z. Kitagawa, *Doing Business in Japan*, Vol. 7 at ¶ 4.03 (1986) (Japan).

25 As a result of *Scherk* and *Mitsubishi*, if domestic securities and antitrust claims are held to be non-arbitrable, the anomalous result would be that foreign arbitrators would be trusted to apply these federal laws but U.S. arbitrators would not be. With the increasing internationalization of the securities markets, such a distinction would be irrational.

As these developments demonstrate, arbitration has proven to be a fair, efficient and effective means of resolving commercial disputes, including securities disputes.[26] The *Wilko* Court's assumptions to the contrary have not been borne out by experience and are contrary to the express intent of Congress as embodied in the Arbitration Act. *Wilko* remains one of the final remnants of the judicial suspicion of arbitration that Congress intended to eliminate through the Arbitration Act, and that this Court has soundly rejected in its recent decisions on arbitration. This Court should overrule *Wilko* and "correct[ ] a plain misreading of language and history so as to give full respect to the meaning which Congress unmistakably intended the statute to have." *Nye v. United States*, 313 U.S. 33, 51 (1941) (overruling the statutory construction of *Toledo Newspaper Co. v. United States*, 247 U.S. 402 (1918)); *cf. Monell v. Department of Social Services*, 436 U.S. 658 (1978) (overruling the statutory interpretation of *Monroe v. Pape*, 365 U.S. 167 (1961)); *Commissioner v. Estate of Church*, 335 U.S.

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26 There are various other indicia of the increasing acceptance of arbitration. Whereas in 1950 only 20 states had statutes requiring the enforcement of arbitration clauses, today all but five states (Alabama, Mississippi, Nebraska, North Dakota and West Virginia) do. (Materials in files of AAA's Office of General Counsel.) Moreover, case law, including the decisions of this Court discussed above, is increasingly receptive to arbitration. *See generally* DiBenedetto, "An Outline for Arbitration Under the Civil Practice Law and Rules," 48 Alb. L. Rev. 763, 763 (1984) ("Over the years there has been a dramatic increase in both the number of controversies submitted to arbitration and the judiciary's acceptance and encouragement of this alternative means of dispute resolution."); Hirshman, "The Second Arbitration Trilogy," *supra*. State and federal courts have also increasingly adopted arbitration programs to help resolve disputes. Thus some 16 states already have court-annexed arbitration programs in place, and eight more states and the District of Columbia are contemplating implementation; two federal district courts have such programs in place, and such programs are being adopted in eight more districts. Federal Judicial Center, *Settlement Strategies for Federal District Judges*, 43-46 (1986). Moreover, the AAA's role as an impartial administrator of arbitration has been specifically recognized in two federal statutes, three federal regulations, and over 40 state statutes in 21 states and the Virgin Islands. *See* Lawyers' Arbitration Letter, Vol. 5 No. 2 (June 1981 & 1983 Supp.).

632 (1949) (overruling the statutory interpretation of *May v. Heiner*, 281 U.S. 238 (1930)); *Girouard v. United States*, 328 U.S. 61 (1946) (overruling the statutory interpretation of *United States v. Schwimmer*, 279 U.S. 644 (1929)).[27]

C. THE SECOND CIRCUIT'S BROAD "PUBLIC POLICY" EXCEPTION TO THE ENFORCEMENT OF ARBITRATION CLAUSES CONFLICTS WITH THE ARBITRATION ACT AND THE RECENT DECISIONS OF THIS COURT

In holding that RICO claims are not arbitrable,[28] the Second Circuit relied upon its doctrine, announced in cases such as *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968) (holding arbitration agreements unenforceable as to antitrust disputes), that the Arbitration Act is "inappropriate[ ] . . . when strong public policy considerations are involved." *McMahon*, *supra*, 788 F.2d at 98.

The Second Circuit's "public policy" exception is improper judicial legislation pure and simple. Nothing in the Arbitration Act permits such an exception. Rather, as this Court explained in *Mitsubishi*, arbitration agreements must be enforced as to statutory claims unless there is an explicit statement of Congressional intent to prevent arbitration. In holding RICO claims non-arbitrable for public policy reasons, "the *McMahon* court paid too little deference to the Supreme Court's decision in *Mitsubishi*." *Jacobson v. Merrill Lynch, Pierce,*

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27 Since arbitration clauses should be held to be enforceable as to Securities Act claims, which are based on express statutory rights, *a fortiori* they should be enforced as to claims under the Exchange Act, which are based on implied rights. Since Congress did not expressly create private rights of action under the Exchange Act, it can hardly have intended to preclude arbitration of them. *Amicus* adopts petitioners' arguments on this point.

28 There is nothing in RICO or its legislative history that suggests Congress intended to preclude arbitration of such claims. *Amicus* adopts petitioners' arguments on this point.

Fenner & Smith, Inc., 797 F.2d 1197, 1202 (3d Cir. 1986); *see also Mayaja, Inc. v. Shearson Lehman Brothers, Inc.*, No. 85-2762, slip op. at 13-14 n.6 (5th Cir. Oct. 24, 1986). After *Mitsubishi*,

> [d]etermining statutory claims to be nonarbitrable on the basis of some judicially recognized public policy rather than as a matter of statutory interpretation is no longer permissible.

Jacobson, *supra*, 797 F.2d at 1202; *see also Mayaja*, *supra*, slip op. at 13-14 n.6. Accordingly, although it did not need to reach the issue, the *Mitsubishi* Court noted its "skepticism of certain aspects of the *American Safety* doctrine." 105 S. Ct. at 3357. As the Fifth Circuit has stated, "*Mitsubishi* rejected so much of *American Safety*'s reasoning it is difficult to say what is left of the opinion to rely on." *Mayaja*, *supra*, slip op. at 14 n.6.

The so-called "public policy" exception to the Arbitration Act is unwarranted and unwise. It flies in the face of the express language of the Arbitration Act and of this Court's decision in *Mitsubishi*. It should be rejected.[29]

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29 The exception is all the more improper because there is no rational way to limit it. Presumably, all statutes reflect a Congressional expression of public policy; otherwise, Congress would not have enacted the legislation. The Second Circuit has not articulated any way to distinguish those statutes for which arbitration would be precluded under its public policy exception from those for which it would be allowed.

Rather, this Court articulated the proper test in *Mitsubishi*. Since Congress established the rule that arbitration clauses should be enforced, it requires Congress to create an exception. Unless Congress has expressly created such an exception, arbitration clauses must be enforced, and courts should not be permitted to substitute their view of public policy for Congress's.

CONCLUSION

The Federal Arbitration Act, the recent decisions of this Court, and decades of extensive experience with arbitration, all require the same conclusion: contractual agreements whereby parties select arbitration for the resolution of commercial disputes—including disputes based on statutory claims—should be enforced absent an express statement of Congressional intent to the contrary. Since nothing in the Securities Act, the Exchange Act, or RICO—or in the legislative history of those statutes—evidences a Congressional intent to preclude arbitration, arbitration clauses should be enforced as to claims under all three statutes.

Wilko v. Swan, which held arbitration clauses unenforceable as to Securities Act disputes, should be overruled because it was based on a suspicion of arbitration subsequently acknowledged by this Court—and proven by experience—to be unfounded, rather than on evidence of the intent of Congress. Disputes under the Exchange Act and RICO are even more clearly arbitrable. This Court should reject the broad "public policy" exception to arbitration articulated by the court below, since it is contrary to the express language of the Arbitration Act and the decisions of this Court.

Thus, the Second Circuit's decision should be reversed as to the arbitrability of Exchange Act and RICO claims, and, in order to provide clarity in this important area of the law, *Wilko v. Swan* should be overruled.

Dated: New York, New York
November 20, 1986

Respectfully submitted,

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APPENDICES

APPENDIX A

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Administrative Procedure Act

5 U.S.C. § 706(2)(A), (C):

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> * * *
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law;
>
> * * *
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> * * *

United States Arbitration Act

9 U.S.C. § 2:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 7:

> The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

9 U.S.C. § 9:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the applica-

tion shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

9 U.S.C. § 10(d):

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

* * *

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

* * *

Securities Act of 1933

15 U.S.C. § 77n:

Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

Securities Exchange Act of 1934

15 U.S.C. § 78s(c):

(c) The Commission, by rule, may abrogate, add to, and delete from (hereinafter in this subsection collectively

referred to as "amend") the rules of a self-regulatory organization (other than a registered clearing agency) as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory organization, to conform its rules to requirements of this chapter and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this chapter, in the following manner:

(1) The Commission shall notify the self-regulatory organization and publish notice of the proposed rulemaking in the Federal Register. The notice shall include the text of the proposed amendment to the rules of the self-regulatory organization and a statement of the Commission's reasons, including any pertinent facts, for commencing such proposed rulemaking.

(2) The Commission shall give interested persons an opportunity for the oral presentation of data, views, and arguments, in addition to an opportunity to make written submissions. A transcript shall be kept of any oral presentation.

(3) A rule adopted pursuant to this subsection shall incorporate the text of the amendment to the rules of the self-regulatory organization and a statement of the Commission's basis for and purpose in so amending such rules. This statement shall include an identification of any facts on which the Commission considers its determination so to amend the rules of the self-regulatory agency to be based, including the reasons for the Commission's conclusions as to any of such facts which were disputed in the rulemaking.

(4)(A) Except as provided in paragraphs (1) through (3) of this subsection, rulemaking under this subsection shall be in accordance with the procedures specified in section 553 of Title 5 for rulemaking not on the record.

(B) Nothing in this subsection shall be construed to impair or limit the Commission's power to make, or to modify or alter the procedures the Commission may follow in making, rules and regulations pursuant to any other authority under this chapter.

(C) Any amendment to the rules of a self-regulatory organization made by the Commission pursuant to this subsection shall be considered for all purposes of this chapter to be part of the rules of such self-regulatory organization and shall not be considered to be a rule of the Commission.

APPENDIX B

AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION RULES

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COMMERCIAL ARBITRATION RULES

1. *Agreement of Parties.* The parties shall be deemed to have made these Rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association or under its Rules. These Rules and any amendment thereof shall apply in the form obtaining at the time the arbitration is initiated.

2. *Name of Tribunal.* Any Tribunal constituted by the parties for the settlement of their dispute under these Rules shall be called the Commercial Arbitration Tribunal.

3. *Administrator.* When parties agree to arbitrate under these Rules, or when they provide for arbitration by the American Arbitration Association and an arbitration is initiated thereunder, they thereby constitute the AAA the administrator of the arbitration. The authority and obligations of the administrator are prescribed in the agreement of the parties and in these Rules.

4. *Delegation of Duties.* The duties of the AAA under these Rules may be carried out through Tribunal Administrators, or such other officers or committees as the AAA may direct.

5. *National Panel of Arbitrators.* The AAA shall establish and maintain a National Panel of Arbitrators and shall appoint Arbitrators therefrom as hereinafter provided.

6. *Office of Tribunal.* The general office of a Tribunal is the headquarters of the AAA, which may, however, assign the administration of an arbitration to any of its Regional Offices.

7. *Initiation under an Arbitration Provision in a Contract.* Arbitration under an arbitration provision in a contract may be initiated in the following manner:

> (a) The initiating party shall give notice to the other party of its intention to arbitrate (Demand), which notice shall contain a statement setting forth the nature of the dispute, the amount involved, if any, the remedy sought, and

(b) By filing at any Regional Office of the AAA three copies of said notice, together with three copies of the arbitration provisions of the contract, together with the appropriate administrative fee as provided in the Administrative Fee Schedule. The AAA shall give notice of such filing to the other party. If so desired, the party upon whom the Demand for Arbitration is made may file an answering statement in duplicate with the AAA within seven days after notice from the AAA, in which event said party shall simultaneously send a copy of the answer to the other party. If a counterclaim is asserted it shall contain a statement setting forth the nature of the counterclaim, the amount involved, if any, and the remedy sought. If a monetary claim is made in the answer the appropriate fee provided in the Fee Schedule shall be forwarded to the AAA with the answer. If no answer is filed within the stated time, it will be assumed that the claim is denied. Failure to file an answer shall not operate to delay the arbitration.

Unless the AAA in its discretion determines otherwise, the Expedited Procedures of Commercial Arbitration shall be applied in any case where the total claim of any party does not exceed $15,000, exclusive of interest and arbitration costs. The Expedited Procedures shall be applied as described in Sections 54 through 58 of these Rules.

8. *Change of Claim*. After filing of the claim, if either party desires to make any new or different claim, such claim shall be made in writing and filed with the AAA, and a copy thereof shall be mailed to the other party, who shall have a period of seven days from the date of such mailing within which to file an answer with the AAA. After the Arbitrator is appointed, however, no new or different claim may be submitted except with the Arbitrator's consent.

9. *Initiation under a Submission*. Parties to any existing dispute may commence an arbitration under these Rules by filing at any Regional Office two copies of a written agreement

to arbitrate under these Rules (Submission), signed by the parties. It shall contain a statement of the matter in dispute, the amount of money involved, if any, and the remedy sought, together with the appropriate administrative fee as provided in the Fee Schedule.

10. *Pre-hearing Conference and Preliminary Hearing.* At the request of the parties or at the discretion of the AAA, a pre-hearing conference with the administrator and the parties will be scheduled in appropriate cases to arrange for an exchange of information and the stipulation to uncontested facts to expedite the arbitration proceedings.

In large or complex cases, at the discretion of the Arbitrator(s) or the AAA, a preliminary hearing will be scheduled with the Arbitrator(s) and the parties to arrange for the production of relevant documents and other evidence, to identify witnesses to be called, to schedule further hearings, and to consider any other matters which will expedite the arbitration proceedings.

11. *Fixing of Locale.* The parties may mutually agree on the locale where the arbitration is to be held. If the locale is not designated within seven days from the date of filing the Demand or Submission, the AAA shall have power to determine the locale. Its decision shall be final and binding. If any party requests that the hearing be held in a specific locale and the other party files no objection thereto within seven days after notice of the request, the locale shall be the one requested.

12. *Qualifications of Arbitrator.* Any Arbitrator appointed pursuant to Section 13 or Section 15 shall be neutral, subject to disqualification for the reasons specified in Section 19. If the agreement of the parties names an Arbitrator or specifies any other method of appointing an Arbitrator, or if the parties specifically agree in writing, such Arbitrator shall not be subject to disqualification for said reasons.

13. *Appointment from Panel.* If the parties have not appointed an Arbitrator and have not provided any other method

of appointment, the Arbitrator shall be appointed in the following manner: Immediately after the filing of the Demand or Submission, the AAA shall submit simultaneously to each party to the dispute an identical list of names of persons chosen from the Panel. Each party to the dispute shall have seven days from the mailing date in which to cross off any names objected to, number the remaining names to indicate the order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an Arbitrator to serve. If the parties fail to agree upon any of the persons named, or if acceptable Arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the Panel without the submission of any additional list.

14. *Direct Appointment by Parties.* If the agreement of the parties names an Arbitrator or specifies a method of appointing an Arbitrator, that designation or method shall be followed. The notice of appointment, with name and address of the appointing party, shall be filed with the AAA by the appointing party. Upon the request of any such appointing party, the AAA shall submit a list of members of the Panel from which the party may, if it so desires, make the appointment.

If the agreement specifies a period of time within which an Arbitrator shall be appointed, and any party fails to make such appointment within that period, the AAA shall make the appointment.

If no period of time is specified in the agreement, the AAA shall notify the parties to make the appointment and if within seven days thereafter such Arbitrator has not been so appointed, the AAA shall make the appointment.

15. *Appointment of Neutral Arbitrator by Party-Appointed Arbitrators.* If the parties have appointed their Arbitrators or if either or both of them have been appointed as provided in Section 14, and have authorized such Arbitrators to appoint a neutral Arbitrator within a specified time and no appointment is made within such time or any agreed extension thereof, the AAA shall appoint a neutral Arbitrator who shall act as Chairman.

If no period of time is specified for appointment of the neutral Arbitrator and the parties do not make the appointment within seven days from the date of the appointment of the last party-appointed Arbitrator, the AAA shall appoint such neutral Arbitrator, who shall act as Chairman.

If the parties have agreed that their Arbitrators shall appoint the neutral Arbitrator from the Panel, the AAA shall furnish to the party-appointed Arbitrators, in the manner prescribed in Section 13, a list selected from the Panel, and the appointment of the neutral Arbitrator shall be made as prescribed in such Section.

16. *Nationality of Arbitrator in International Arbitration.* If one of the parties is a national or resident of a country other than the United States, the sole Arbitrator or the neutral Arbitrator shall, upon the request of either party, be appointed from among the nationals of a country other than that of any of the parties.

17. *Number of Arbitrators.* If the arbitration agreement does not specify the number of Arbitrators, the dispute shall be heard and determined by one Arbitrator, unless the AAA, in its discretion, directs that a greater number of Arbitrators be appointed.

18. *Notice to Arbitrator of Appointment.* Notice of the appointment of the neutral Arbitrator, whether appointed by the parties or by the AAA, shall be mailed to the Arbitrator by the AAA, together with a copy of these Rules, and the signed acceptance of the Arbitrator shall be filed prior to the opening of the first hearing.

19. *Disclosure and Challenge Procedure.* A person appointed as neutral Arbitrator shall disclose to the AAA any circumstances likely to affect impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their counsel. Upon receipt of such information from such Arbitrator or other source, the AAA shall communicate such information to the parties, and, if it deems it appropriate to do so, to the Arbitrator and others. Thereafter, the AAA shall determine whether the Arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive.

20. *Vacancies.* If any Arbitrator should resign, die, withdraw, refuse, be disqualified or be unable to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these Rules.

In the event of a vacancy in a panel of neutral Arbitrators, the remaining Arbitrator or Arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.

21. *Time and Place.* The Arbitrator shall fix the time and place for each hearing. The AAA shall mail to each party notice thereof at least five days in advance, unless the parties by mutual agreement waive such notice or modify the terms thereof.

22. *Representation by Counsel.* Any party may be represented by counsel. A party intending to be so represented shall notify the other party and the AAA of the name and address of counsel at least three days prior to the date set for the hearing at which counsel is first to appear. When an arbitration is initiated by counsel, or where an attorney replies for the other party, such notice is deemed to have been given.

23. *Stenographic Record.* Any party wishing a stenographic record shall make such arrangements directly with the stenographer and shall notify the other parties of such arrangements in advance of the hearing. The requesting party or parties shall pay the cost of such record.

24. *Interpreter.* Any party wishing an interpreter shall make all arrangements directly with an interpreter and shall assume the costs of such service.

25. *Attendance at Hearings.* The Arbitrator shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The Arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the Arbitrator to determine the propriety of the attendance of any other person.

26. *Adjournments.* The Arbitrator may take adjournments upon the request of a party or upon the Arbitrator's own initiative and shall take such adjournment when all of the parties agree thereto.

27. *Oaths.* Before proceeding with the first hearing or with the examination of the file, each Arbitrator may take an oath of office, and if required by law, shall do so. The Arbitrator has discretion to require witnesses to testify under oath administered by any duly qualified person or, if required by law or demanded by either party, shall do so.

28. *Majority Decision.* Whenever there is more than one Arbitrator, all decisions of the Arbitrators must be by at least a majority. The award must also be made by at least a majority unless the concurrence of all is expressly required by the arbitration agreement or by law.

29. *Order of Proceedings.* A hearing shall be opened by the filing of the oath of the Arbitrator, where required, and by the recording of the place, time and date of the hearing, the presence of the Arbitrator and parties, and counsel, if any, and by the receipt by the Arbitrator of the statement of the claim and answer, if any.

The Arbitrator may, at the beginning of the hearing, ask for statements clarifying the issues involved.

The complaining party shall then present its claim and proofs and its witnesses, who shall submit to questions or other examination. The defending party shall then present its defense and proofs and its witnesses, who shall submit to questions or other examination. The Arbitrator has discretion to vary this procedure but shall afford full and equal opportunity to all parties for the presentation of any material or relevant proofs.

Exhibits, when offered by either party, may be received in evidence by the Arbitrator.

The names and addresses of all witnesses and exhibits in order received shall be made a part of the record.

30. *Arbitration in the Absence of a Party.* Unless the law provides to the contrary, the arbitration may proceed in the absence of any party which, after due notice, fails to be present or fails to obtain an adjournment. An award shall not be made solely on the default of a party. The Arbitrator shall require the party who is present to submit such evidence as the Arbitrator may require for the making of an award.

31. *Evidence.* The parties may offer such evidence as is relevant and material to the dispute and shall produce such additional evidence as the Arbitrator may deem necessary to an understanding and determination of the dispute. An Arbitrator authorized by law to subpoena witnesses or documents may do so upon the request of any party, or independently.

The Arbitrator shall be the judge of the relevance and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all the Arbitrators and all of the parties, except where any of the parties is absent in default or has waived the right to be present.

32. *Evidence by Affidavit and Filing of Documents.* The Arbitrator shall receive and consider the evidence of witnesses by affidavit, but shall give it only such weight as the Arbitrator deems it entitled to after consideration of any objections made to its admission.

All documents not filed with the Arbitrator at the hearing, but arranged for at the hearing or subsequently by agreement of the parties, shall be filed with the AAA for transmission to the Arbitrator. All parties shall be afforded opportunity to examine such documents.

33. *Inspection or Investigation.* Whenever the Arbitrator deems it necessary to make an inspection or investigation in connection with the arbitration, the Arbitrator shall direct the AAA to advise the parties of such intention. The Arbitrator shall set the time and the AAA shall notify the parties thereof. Any party who so desires may be present at such inspection or investigation. In the event that one or both parties are not present at the inspection or investigation, the Arbitrator shall make a verbal or written report to the parties and afford them an opportunity to comment.

34. *Conservation of Property.* The Arbitrator may issue such orders as may be deemed necessary to safeguard the property which is the subject matter of the arbitration without prejudice to the rights of the parties or to the final determination of the dispute.

35. *Closing of Hearings.* The Arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies, or if satisfied that the record is complete, the Arbitrator shall declare the hearings closed and a minute thereof shall be recorded. If briefs are to be filed, the hearing shall be declared closed as of the final date set by the Arbitrator for the receipt of briefs. If documents are to be filed as provided for in Section 32 and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the date of closing the hearings. The time limit within which the Arbitrator is required to make the award shall commence to run, in the absence of other agreements by the parties, upon the closing of the hearings.

36. *Reopening of Hearings.* The hearings may be reopened on the Arbitrator's own motion, or upon application of a

party, at any time before the award is made. If reopening the hearings would prevent the making of the award within the specific time agreed upon by the parties in the contract out of which the controversy has arisen, the matter may not be reopened, unless the parties agree upon the extension of such time limit. When no specific date is fixed in the contract, the Arbitrator may reopen the hearings, and the Arbitrator shall have thirty days from the closing of the reopened hearings within which to make an award.

37. *Waiver of Oral Hearings.* The parties may provide, by written agreement, for the waiver of oral hearings. If the parties are unable to agree as to the procedure, the AAA shall specify a fair and equitable procedure.

38. *Waiver of Rules.* Any party who proceeds with the arbitration after knowledge that any provision or requirement of these Rules has not been complied with and who fails to state objection thereto in writing, shall be deemed to have waived the right to object.

39. *Extensions of Time.* The parties may modify any period of time by mutual agreement. The AAA for good cause may extend any period of time established by these Rules, except the time for making the award. The AAA shall notify the parties of any such extension of time and its reason therefor.

40. *Communication with Arbitrator and Serving of Notice.*

(a) There shall be no communication between the parties and a neutral Arbitrator other than at oral hearings. Any other oral or written communications from the parties to the Arbitrator shall be directed to the AAA for transmittal to the Arbitrator.

(b) Each party to an agreement which provides for arbitration under these Rules shall be deemed to have consented that any papers, notices or process necessary or proper for the initiation or continuation of an arbitration under these Rules and for any court action in connection therewith or for the entry of judgment on any award made thereunder may be

served upon such party by mail addressed to such party or its attorney at its last known address or by personal service, within or without the state wherein the arbitration is to be held (whether such party be within or without the United States of America), provided that reasonable opportunity to be heard with regard thereto has been granted such party.

41. *Time of Award.* The award shall be made promptly by the Arbitrator and, unless otherwise agreed by the parties, or specified by law, no later than thirty days from the date of closing the hearings, or if oral hearings have been waived, from the date of transmitting the final statements and proofs to the Arbitrator.

42. *Form of Award.* The award shall be in writing and shall be signed either by the sole Arbitrator or by at least a majority if there be more than one. It shall be executed in the manner required by law.

43. *Scope of Award.* The Arbitrator may grant any remedy or relief which the Arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract. The Arbitrator, in the award, shall assess arbitration fees and expenses in favor of any party and, in the event any administrative fees or expenses are due the AAA, in favor of the AAA.

44. *Award upon Settlement.* If the parties settle their dispute during the course of the arbitration, the Arbitrator, upon their request, may set forth the terms of the agreed settlement in an award.

45. *Delivery of Award to Parties.* Parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail by the AAA, addressed to such party at its last known address or to its attorney, or personal service of the award, or the filing of the award in any manner which may be prescribed by law.

46. *Release of Documents for Judicial Proceedings.* The AAA shall, upon the written request of a party, furnish to such

party, at its expense, certified facsimiles of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

47. *Applications to Court and Exclusion of Liability.*

(a) No judicial proceedings by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any Arbitrator in a proceeding under these Rules is a necessary party in judicial proceedings relating to the arbitration.

(c) Parties to these Rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any Federal or State Court having jurisdiction thereof.

(d) Neither the AAA nor any Arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these Rules.

48. *Administrative Fees.* As a not-for-profit organization, the AAA shall prescribe an Administrative Fee Schedule and a Refund Schedule to compensate it for the cost of providing administrative services. The schedule in effect at the time of filing or the time of refund shall be applicable.

The administrative fees shall be advanced by the initiating party or parties, subject to final apportionment by the Arbitrator in the award.

When a matter is withdrawn or settled, the refund shall be made in accordance with the Refund Schedule.

The AAA, in the event of extreme hardship on the part of any party, may defer or reduce the administrative fee.

49. *Fee when Oral Hearings Are Waived.* When all oral hearings are waived under Section 37, the Administrative Fee Schedule shall apply.

50. *Expenses.* The expenses of witnesses for either side shall be paid by the party producing such witnesses.

The cost of the stenographic record, if any is made, and all transcripts thereof, shall be prorated equally among all parties ordering copies unless they shall otherwise agree and shall be paid for by the responsible parties directly to the reporting agency.

All other expenses of the arbitration, including required traveling and other expenses of the Arbitrator and of AAA representatives, and the expenses of any witness or the cost of any proofs produced at the direct request of the Arbitrator, shall be borne equally by the parties, unless they agree otherwise, or unless the Arbitrator, in the award, assesses such expenses or any part thereof against any specified party or parties.

51. *Arbitrator's Fee*. Members of the National Panel of Arbitrators who serve as neutral Arbitrators do so in most cases without fee. In prolonged or in special cases the parties may agree to pay a fee, or the AAA may determine that payment of a fee by the parties is appropriate and may establish a reasonable amount, taking into account the extent of service by the Arbitrator and other relevant circumstances of the case. When neutral Arbitrators are to be paid, the arrangements for compensation shall be made through the AAA and not directly between the parties and the Arbitrators.

52. *Deposits*. The AAA may require the parties to deposit in advance such sums of money as it deems necessary to defray the expense of the arbitration, including the Arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance.

53. *Interpretation and Application of Rules*. The Arbitrator shall interpret and apply these Rules insofar as they relate to the Arbitrator's powers and duties. When there is more than one Arbitrator and a difference arises among them concerning the meaning or application of any such Rules, it shall be decided by a majority vote. If that is unobtainable, either an Arbitrator or a party may refer the question to the AAA for final decision. All other Rules shall be interpreted and applied by the AAA.

EXPEDITED PROCEDURES

54. *Notice by Telephone.* The parties shall accept all notices from the AAA by telephone. Such notices by the AAA shall subsequently be confirmed in writing to the parties. Notwithstanding the failure to confirm in writing any notice or objection hereunder, the proceeding shall nonetheless be valid if notice has, in fact, been given by telephone.

55. *Appointment and Qualifications of Arbitrators.* The AAA shall submit simultaneously to each party to the dispute an identical list of five members of the Commercial Arbitration Panel of Arbitrators from which one Arbitrator shall be appointed. Each party shall have the right to strike two names from the list on a peremptory basis. The list is returnable to the AAA within 10 days from the date of mailing. If for any reasons the appointment cannot be made from the list, the AAA shall have the authority to make the appointment from among other members of the Panel without the submission of additional lists. Such appointment shall be subject to disqualification for the reasons specified in Section 19. The parties shall be given notice by telephone by the AAA of the appointment of the Arbitrator. The parties shall notify the AAA, by telephone, within seven (7) days of any objections to the Arbitrators appointed. Any objection by a party to such Arbitrator shall be confirmed in writing to the AAA with a copy to the other party(ies).

56. *Time and Place of Hearing.* The Arbitrator shall fix the date, time and place of the hearing. The AAA will notify the parties by telephone, seven (7) days in advance of the hearing date. Formal Notice of Hearing will be sent by the AAA to the parties.

57. *The Hearing.* Generally, the hearing shall be completed within one day. The Arbitrator, for good cause shown, may schedule an additional hearing to be held within five days.

58. *Time of Award.* Unless otherwise agreed to by the parties, the award shall be rendered not later than five (5) business days from the date of the closing of the hearing.

ADMINISTRATIVE FEE SCHEDULE

The administrative fee of the AAA is based upon the amount of each claim and counterclaim as disclosed when the claim and counterclaim are filed, and is due and payable at the time of filing.

Amount of Claim	*Fee*
$1 to $20,000	3% (minimum $200)
$20,000 to $40,000	$600, plus 2% of excess over $20,000
$40,000 to $80,000	$1000, plus 1% of excess over $40,000
$80,000 to $160,000	$1400, plus 1/2% of excess over $80,000
$160,000 to $5,000,000	$1800, plus 1/4% of excess over $160,000

Where the claim or counterclaim exceeds $5 million, an appropriate fee will be determined by the AAA.

When no amount can be stated at the time of filing, the administrative fee is $500, subject to adjustment in accordance with the above schedule as soon as an amount can be disclosed.

In those claims and counterclaims which are not for a monetary amount, an appropriate administrative fee will be determined by the AAA.

If there are more than two parties represented in the arbitration, an additional 10% of the initiating fee will be due for each additional represented party.

OTHER SERVICE CHARGES

$50 payable by a party causing an adjournment of any scheduled hearing;

$100 payable by a party causing a second or additional adjournment of any scheduled hearing;

$50 payable by each party for each hearing after the first hearing which is either clerked by the AAA or held in a hearing room provided by the AAA.

REFUND SCHEDULE

If the AAA is notified that a case has been settled or withdrawn before a list of Arbitrators has been sent out, all the fee in excess of $200 will be refunded.

If the AAA is notified that a case has been settled or withdrawn before the original due date for the return of the first list, two-thirds of the fee in excess of $200 will be refunded.

If the AAA is notified that a case is settled or withdrawn during or following a pre-hearing conference or at least 48 hours before the date and the time set for the first hearing, one-third of the fee in excess of $200 will be refunded.